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IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

JAMES LYNN STYERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Capital Case

QUESTIONS PRESENTED

In December 1989, James Lynn Styers took 4-year-old Christopher Milke into the desert and shot him three times in the back of the head. On direct appeal, the Arizona Supreme Court found one aggravating circumstance invalid and re-weighed the remaining aggravating circumstances and proffered mitigation. In its independent review of Styers' death sentence, the Arizona Supreme Court explicitly stated that it had considered all of the proffered mitigating evidence, but found Styers' proffered mitigation not sufficiently substantial to warrant leniency and affirmed his death sentence. *State v. Styers*, 177 Ariz. 104, 117, 865 P.2d 765, 778 (1993).

A panel of the Ninth Circuit concluded that the Arizona Supreme Court failed to properly re-weigh the mitigation evidence pursuant to *Clemons v. Mississippi*, 494 U.S. 738, 748–49 (1990), because it failed to consider Styers' post-traumatic stress disorder mitigation. *Styers v. Schriro*, 547 F.3d 1026, 1035–37 (9th Cir. 2008) (Pet. App. A, at 19–20.)

1. Under the Anti-terrorism and Effective Death Penalty Act (AEDPA), when a State's highest court explicitly states it has considered proffered mitigation evidence, must a habeas reviewing court accept that statement, absent clear and convincing evidence to the contrary?

2. This Court has clearly established that a State cannot preclude a capital sentencer from

considering or giving effect to relevant mitigation evidence. *Smith v. Texas*, 543 U.S. 37, 45 (2004); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Here, in considering the proffered mitigation evidence of post-traumatic stress disorder, the Arizona Supreme Court elected to give Styers' evidence no significant mitigating weight because he could not connect his alleged condition to his murderous act. Did the Ninth Circuit violate this Court's jurisprudence by holding that *Smith* forbids a sentencer from relying on the absence of a causal nexus between an alleged mental condition and the crime committed in deciding how much weight to give the proffered mitigation evidence?

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OPINION BELOW

A panel of the United States Court of Appeals for the Ninth Circuit (Chief Judge Kozinski, and Judges Farris and Bea) held in a per curiam decision that the Arizona Supreme Court failed, after invalidating an aggravating factor, to properly re-weigh the mitigation evidence with the remaining aggravating factors as required by *Clemons v. Mississippi*, 494 U.S. 738, 748–49 (1990). *Styers v. Schriro*, 547 F.3d 1026, 1035–36 (9th Cir. 2008) (Pet. App. A, at 19–20.) The panel decision reversed a decision by the United States District Court for the District of Arizona. *Styers v. Schriro*, 2007 WL 86944 (D.Ariz. Jan. 10, 2007); *see also State v. Styers*, 177 Ariz. 104, 865 P.2d 765 (1993).

STATEMENT OF JURISDICTION

The Ninth Circuit denied Petitioner's request for rehearing en banc on December 11, 2008. This petition for writ of certiorari is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

In early December 1989, Styers shot and killed Christopher Milke, the 4-year-old son of Debra Milke, the woman with whom he shared an apartment. Following a jury trial, Styers was convicted of first-degree murder, conspiracy to commit first-degree murder, child abuse, and kidnapping. The trial court found three aggravating circumstances: the victim was under the age of 15, A.R.S. § 13–703(F)(9); the murder was committed in expectation of pecuniary gain, A.R.S. § 13–703(F)(5); and the murder was committed in an especially heinous and depraved manner, A.R.S. § 13–703(F)(6). After considering all proffered mitigating evidence, the trial court found the mitigation was not sufficiently substantial to call for leniency, and sentenced Styers to death. *State v. Styers*, 177 Ariz. 104, 109, 865 P.2d 765, 770 (1993).

On direct appeal, the Arizona Supreme Court reversed the finding of the pecuniary gain aggravating circumstance. The state court found that there was insufficient evidence that Styers' co-defendant, Debra Milke, agreed to pay Styers to murder her 4-year-old son. 177 Ariz. at 115, 865 P.2d at 776. The court nevertheless upheld Styers' death sentence after independently reviewing the remaining aggravating

circumstances and the mitigation evidence proffered by Styers:

> The special verdict stated that none of the statutory mitigating circumstances were proven and found no nonstatutory "mitigating circumstances sufficiently substantial to call for leniency." Defendant argues that the following facts constitute mitigating evidence that warrants leniency: no prior criminal record; honorable discharge from United States Marines after serving in Vietnam; evidence that defendant suffered from post-traumatic stress syndrome; defendant cared for Christopher; and the giving of a felony murder instruction.
>
> Defendant had no prior convictions for either misdemeanors or felony offense. This is relevant mitigating evidence. *See State v. Rossi (Rossi III),* 171 Ariz. 276, 279, 830 P.2d 797, 800, *cert. denied,* 506 U.S. 1003, 113 S.Ct. 610, 121 L.Ed.2d 544 (1992). Defendant's service in Vietnam and honorable discharge are also relevant mitigating circumstances. *See State v. Lavers,* 168 Ariz. 376, 396, 814 P.2d 333, 353, *cert. denied,* 502 U.S. 926, 112 S.Ct. 343, 116 L.Ed.2d 282 (1991). Defendant also suffered from post-traumatic stress disorder prior to and around the time of the murder as a result of his combat service in Vietnam. This could also, in an

appropriate case, constitute mitigation. *See State v. Bilke,* 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989) (finding evidence of post-traumatic stress disorder constituted newly-discovered evidence that may have affected sentencing). However, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.

There was testimony that defendant cared for Christopher at times, but his actions and participation in his murder speak volumes to that. Finally, giving a felony murder instruction "is not relevant 'where the defendant intended to kill the victim or where the defendant knew with substantial certainty that his conduct would cause death.'" *State v. Gillies,* 135 Ariz. 500, 513, 662 P.2d 1007, 1020 (1983) (quoting *State v. Zaragosa,* 135 Ariz. 63, 659 P.2d 22, *cert. denied,* 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1356 (1983)). The defendant conspired to kill Christopher and then he killed him. The fact that the court gave a felony murder instruction is not mitigating here.

Because the trial court did not list each of the proffered items of claimed mitigation and state that it found them unavailing does not mean that the trial court did not consider them. It is apparent that the trial court considered this evidence, but

> ultimately found that it was not sufficiently substantial to call for leniency. We will also *consider* it in our independent review.
>
> . . .
>
> This court independently reviews aggravating and mitigating circumstances to determine whether the death penalty was properly imposed. *See Rossi*, 171 Ariz. at 278, 830 P.2d at 799. We have excluded from our consideration pecuniary gain, having found the evidence does not prove that factor beyond a reasonable doubt. We have *considered* all of the proffered mitigation and, like the trial court, find it is not sufficiently substantial to warrant leniency.

177 Ariz. at 116–17, 865 P.2d at 777–78. (Emphasis added.)

After exhausting his state post-conviction review, Styers petitioned for a writ of habeas corpus in district court, raising a number of constitutional claims regarding his trial and sentencing proceedings. The district court denied his petition, but granted a certificate of appealability as to his claim that he received ineffective assistance of counsel. A panel of the Ninth Circuit expanded the certificate of appealability to include a claim that the Arizona Supreme Court failed to narrow a facially vague aggravating factor, and failed to properly reweigh all

aggravating and mitigating factors after striking one of the aggravating factors.

The Ninth Circuit panel then held that the Arizona Supreme Court required a causal nexus between the mitigating evidence and the crime before giving the mitigation adequate consideration. The panel concluded that the state court failed to consider Styers' mitigation evidence of post-traumatic stress disorder in violation of *Smith v. Texas*, 543 U.S. 37 (2004), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2008). The State subsequently filed a petition for rehearing en banc, which was denied.

SUMMARY OF ARGUMENT

1. The Ninth Circuit failed to give appropriate AEDPA deference to the Arizona Supreme Court's finding that it had considered all of Styers' proffered mitigation evidence. Under the AEDPA, federal courts are prohibited from granting habeas relief unless a state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with "clear and convincing evidence." Despite the state court's explicit statement that it had considered all of the mitigation evidence, the Ninth Circuit held that the state court failed to do so because the state court "appeared" to apply an unconstitutional

bar to the consideration of Styers' mitigation evidence. There is no clearly established Supreme Court authority that precludes a state court from finding, after considering proffered mitigation evidence, that the proffered evidence is not mitigating. The state court considered Styers' proffered evidence as required by *Eddings v. Oklahoma*. The Ninth Circuit's decision is also improper under the AEDPA because it fails to give any deference to the Arizona Supreme Court's findings or to overcome the presumption that the state court knows and follows the law.

2. The Ninth Circuit's interpretation of the Arizona Supreme Court's opinion in this case directly conflicts with the Arizona Supreme Court's capital sentencing jurisprudence and with this Court's clearly established principle that the sentencer, after considering mitigation evidence, is not required to ascribe a certain weight to that mitigation evidence. Despite the state court's explicit statement that it had *considered* all proffered mitigating evidence, the Ninth Circuit found that the state court had not done so, and erroneously mischaracterized the state court's opinion as requiring a nexus test before considering mitigation evidence in violation of *Smith v. Texas*. Arizona has never required a "causal nexus" test before the sentencer considers mitigation evidence. To the contrary, the state court has always followed the rule announced in *Eddings v. Oklahoma*, and *considers* proffered relevant mitigation. Arizona's assessment of the nexus between the mitigation evidence and a defendant's conduct applies to the weight the evidence is given—not to whether the evidence is *considered*. Given the broad applicability of the Ninth Circuit's decision and its clear conflict with

Arizona law as set forth by the Arizona Supreme Court, review by this court is imperative.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

THE NINTH CIRCUIT FAILED TO GIVE PROPER AEDPA DEFERENCE TO THE ARIZONA SUPREME COURT'S FINDING THAT IT HAD CONSIDERED ALL PROFFERED MITIGATION IN ITS INDEPENDENT REWEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES.

Because Styers filed his petition for writ of habeas corpus after April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). The Ninth Circuit's ruling violates the basic tents of the AEDPA by finding that the state court failed to do something (consider mitigation evidence) that the state court expressly stated it had done. The Ninth Circuit's ruling ignores basic principles of comity and should be reversed by the Court.

Under the AEDPA, federal courts may grant habeas relief from a state conviction only if it is contrary to, or an unreasonable application of, clearly established law as determined by the United States Supreme Court, or it was based on an unreasonable determination of the facts in light of the evidence presented in the state courts. *See Mitchell v. Esparza*,

540 U.S. 12, 15 (2003).

The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under the law." *Bell v. Cone,* 535 U.S. 685, 693 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 403–04 (2000)). The AEDPA was specifically enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and to further the principles of comity, finality, and federalism." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (citations omitted); *Greenawalt v. Stewart*, 105 F.3d 1268, 1275 (9th Cir. 1997) ("Congress intended to restrict the availability of habeas corpus relief when it passed the Act."). Under the AEDPA, a state prisoner is not entitled to federal habeas relief with respect to any federal claim that was adjudicated on the merits in state court proceedings unless adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This amended statute creates a "highly deferential standard for evaluating state court rulings." *Lindh*, 521 U.S. at 334, n.7 (1997). Thus, review of the state court's decision is not "*de novo*." *Van Tran v. Lindsey*, 212 F.3d 1143, 1149 (9th Cir. 2000) (*overruled in part on other grounds*, *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)).

In evaluating the state court decision, the federal courts must refrain from mischaracterization of the state court opinion or record, and must defer to the presumption that state courts know and follow the law. *See, e.g., Bell*, 543 U.S. at 455 ("We do not think that a federal court can presume so lightly that a state court failed to apply its own law. As we have said before, § 2254(d) dictates a 'highly deferential standard for evaluating state-court rulings,' which demands that state-court decisions be given the benefit of the doubt. . . . Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.") (citations omitted)

Despite the Arizona Supreme Court's explicit statement that it had considered the proffered mitigation in this matter, the Ninth Circuit found that the state court failed to consider and give effect to the mitigation evidence that Styers presented. (Pet. App. A, at 20.) However, after invalidating an aggravating circumstance for insufficient evidence, the Arizona Supreme Court considered the proffered mitigation evidence, including Styers' alleged post-traumatic stress disorder from his combat service. Specifically,

the state court stated:

> Because the trial court did not list each of the proffered items of claimed mitigation and state that it found them unavailing does not mean that the trial court did not consider them. It is apparent that the trial court considered this evidence, but ultimately found that it was not sufficiently substantial to call for leniency. *We will also consider it in our independent review.*
>
> . . .
>
> We have *considered* all of the proffered mitigation and, like the trial court, find it is not sufficiently substantial to warrant leniency.

177 Ariz. at 117, 865 P.2d at 778.

The Ninth Circuit failed to give deference to the Arizona Supreme Court's determination that it had considered all of Styers' proffered mitigation. Under the AEDPA, federal courts are required to presume a state court's factual determinations are correct. 28 U.S.C. § 2254(e)(1). The Ninth Circuit ignored this mandatory standard of review and mischaracterized the Arizona Supreme Court's opinion.

The Ninth Circuit found instead that, because the Arizona Supreme Court did not find Styers' PTSD to be mitigating, it unconstitutionally barred the

evidence from being considered. This is a tortured reading of the state court's opinion. The Arizona Supreme Court clearly stated that it considered *all* of Styers' proffered mitigation.

Moreover, the Ninth Circuit failed to defer to AEDPA's presumption that the state court knows and follows the law. *Bell*, 543 U.S. at 455. This Court has held that there is a presumption that courts are deemed to have considered all mitigating evidence where the court so states. *Parker v. Dugger*, 498 U.S. 308, 314 (1991). This Court should summarily reject the Ninth Circuit's ruling that the Arizona Supreme Court did not consider Styers' proffered mitigation.

II

THE NINTH CIRCUIT'S ANALYSIS MISAPPLIES *SMITH v. TEXAS*, AND DIRECTLY CONFLICTS WITH ARIZONA'S CAPITAL SENTENCING JURISPRUDENCE.

The failure to presume that the Arizona Supreme Court knew and followed the law notwithstanding, the Ninth Circuit's decision is contrary to this Court's clearly established jurisprudence that mitigation evidence is not entitled to any particular mitigating weight. *Harris v. Alabama*, 513 U.S. 504, 512 (1995). The Ninth Circuit's decision effectively requires the state court to find, after considering proffered mitigation evidence, that the proffered evidence is mitigating. There is no clearly established Supreme Court authority that

precludes a state court from finding, after considering proffered mitigation evidence, that the proffered evidence is not mitigating.

After considering Styers' proffered PTSD mitigation evidence, the Arizona Supreme Court found it was of no mitigating weight because Styers' experts found that his condition had no relevance to his murderous act. Styers planned the murder—Styers tricked the victim into believing he was going to see Santa Claus, took him into the desert and shot the victim in the back of the head. There was no evidence that the murder was the result of any combat flashbacks or combat stress. The state court simply found that this evidence was not relevant to the murder.

This Court has established that a capital sentencing process that excludes from consideration circumstances of the particular offense or the relevant facets of the character and record of the individual offender violates the Eighth Amendment. *Eddings*, 455 U.S. at 113–14, *Lockett v. Ohio*, 438 U.S. 586, 605–06 (1978). The Eighth Amendment requires that the sentencer have the ability to consider and give effect to mitigation evidence. *Smith,* 543 U.S.at 47. The Arizona Supreme Court, in its reweighing of the mitigation evidence in this case, considered and gave effect to Styers' mitigation evidence. The state court's decision is neither contrary to this Court's clearly established authority, nor an unreasonable application of the law.

The Ninth Circuit's decision is based on a flawed

interpretation of *Smith*, 543 U.S. at 37, and *Eddings*, 455 U.S. at 104, to this case. According to the Ninth Circuit, those cases hold that a sentencer must give substantial weight to *any* mitigating evidence proffered by a capital defendant:

> In conducting its independent review of the propriety of Styers' death sentence, the Arizona Supreme Court stated that it had "considered all of the proffered mitigation," *see Styers*, 177 Ariz. at 117, 865 P.2d at 778. However, its analysis prior to this statement indicates otherwise.
>
> With regards to the evidence that Styers suffered from post-traumatic stress disorder as a result of his combat service in Vietnam, the court stated the following:
>
> > This could also, in an appropriate case, constitute mitigation. *See State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989) . . . *However*, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.
> >
> > *Styers*, 177 Ariz. at 116, 865 P.2d at 177. (Italics added.)

> The court's use of the conjunctive adverb "however," following its acknowledgment that such evidence "could" in certain cases constitute mitigation, indicates that this was not such a case.
>
> . . .
>
> In applying this type of nexus test to conclude that Styers' post traumatic stress disorder did not qualify as mitigating evidence, the Arizona Supreme Court appears to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body.

(Pet. App. A, at 18–20) (citing *Smith v. Texas*, 543 U.S. at 45.)

The Ninth Circuit's opinion misinterprets both the Arizona Supreme Court's opinion and the relevant case law. The court of appeals has mischaracterized the Arizona Supreme Court's legal conclusion and analysis. The Arizona Supreme Court did not decline to *consider* Styers' proffered mitigation regarding his diagnosis of post-traumatic stress disorder. Instead, the state court determined that the proffered mitigating evidence of post-traumatic stress disorder had no substantial mitigating weight.

The Arizona Supreme Court's "causal nexus"

test is simply an application of common sense. If, for example, a defendant asserts as mitigating evidence that he is a white male, or that he was born on a Monday, the sentencer is not required to give any particular weight to those facts, particularly when a defendant does not explain how those factors had some bearing on his adult conduct.

The Ninth Circuit's reliance on *Smith* is unavailing. In *Smith*, this Court found unconstitutional a sentencing scheme that negated jurors' ability to consider and give effect to mitigation evidence if the evidence did not directly relate to two statutorily specified issues. 543 U.S. at 47. In that case, before the jury reached its sentencing decision, the trial judge gave a supplemental instruction directing the jury to give effect to mitigation evidence, but allowed the jury to do so only in the context of negating what would otherwise be affirmative responses to the special issues instruction relating to deliberateness and future dangerousness. *Id.* at 38.

This Court, relying on its holding in *Tennard v. Dretke*, 542 U.S. 274 (2004), reiterated that "the jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a 'low threshold of relevance,' which is satisfied by 'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" 542 U.S. at 284–85 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)). This Court found that the supplemental jury instruction given in *Smith* was similar to the one found unconstitutional in *Penry v.*

Johnson (Penry II), 532 U.S. 782 (2001). There this Court held:

> We generally presume that jurors follow their instructions. Here, however, it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because Penry's mitigating evidence did not fit within the scope of the special issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction.
>
> . . .
>
> The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence.

Id. at 799–800.

Thus, *Smith* and *Tennard* stand only for the proposition that a sentencer cannot be precluded from *considering* proffered mitigation evidence. *Smith* and *Tennard* do not support an assertion that the sentencer cannot determine the weight to be afforded proffered mitigation based on its causal nexus to the crime. In its independent review of Styers' death sentence, the Arizona Supreme Court did not unreasonably apply Supreme Court precedent. Unlike in *Smith*, there were no jury instructions barring the consideration of Styers' proffered mitigation, and in fact the evidence was considered by a sentencer (a state trial judge) who

is presumed to know and follow the law. Styers was not barred from presenting mitigation evidence and the state court considered all of his proffered mitigation evidence.

In considering Styers' mitigating evidence of PTSD, the Arizona Supreme Court found that it was not particularly relevant in this case. By stating that Styers' evidence of post-traumatic stress disorder could have been mitigating in another type of case, the Arizona Supreme Court was not saying it did not consider the evidence—the state court was opining that the evidence did not have any particular mitigating weight in Styers' case. This was not a case where Styers' alleged PTSD condition had any connection to the murder of the 4-year-old victim. Styers planned the murder—Styers tricked the victim into believing he was going to see Santa Claus, and took him into the desert and shot the victim in the back of the head. There was no evidence that the murder was the result of any combat flashbacks or combat stress. Styers' condition was not relevant to his murderous act.

Thirty years ago, this Court held that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Lockett*, 438 U.S. at 608. The Court later held that a capital sentencer must be allowed to consider all relevant mitigating evidence:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter*

> *of law*, any relevant mitigating evidence. . . The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings, 455 U.S. at 114 (emphasis in original). *See also McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment) ("*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.").

The Eighth Amendment thus requires only that a sentencer be able to consider and give effect to mitigating evidence proffered by a capital defendant. This Constitutional provision is satisfied unless evidence is "placed beyond the effective reach of the sentencer" and the sentencer is precluded from considering the proffered mitigation in the first instance. *Graham v. Collins*, 506 U.S. 461, 474 (1993); *see also Kansas v. Marsh*, 548 U.S. 163, 175 (2006) ("In aggregate, [this Court's] precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to *consider* that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here."). (Emphasis added.)

In the instant case, the Arizona Supreme Court explicitly stated that, like the trial court, it considered all of the proffered mitigation evidence. *Styers*, 177 Ariz. at 117, 865 P.2d at 778. There is nothing in the state court's opinion indicating that it failed to consider mitigating evidence or that it barred any mitigating evidence from consideration. While the Arizona Supreme Court relied on the absence of a causal nexus between Styers' alleged PTSD and his subsequent crime in ascribing no significant mitigating weight to the proffered mitigation, there can be no doubt that the court considered the mitigation in its independent review:

> It is apparent that the trial court considered this evidence, but ultimately found that it was not sufficiently substantial to call for leniency. We will also consider it in our independent review.
>
> . . .
>
> We have considered all of the proffered mitigation, and like the trial court, find it is not sufficiently substantial to warrant leniency.

Id.

The Arizona Supreme Court has made clear, both prior to and after the *Tennard* and *Smith* decisions, that the sentencer in a capital case cannot be prohibited from *considering* any proffered mitigation, but that the absence of a causal nexus to the crime may be considered in assessing the weight or significance to be afforded the proffered evidence. In *State v. Hoskins*,

199 Ariz. 127, 152, ¶ 113, 14 P.3d 997, 1022 (2000), the court stated:

> The "nexus" or "causal link" requirement in these cases has purpose. Where we determine questions of aggravation and mitigation in the sentencing process, the significant point in time for causation is the moment at which the criminal acts are committed. If the defendant's personality disorder or dysfunctional family background leads reasonable experts to conclude that the disorder in fact caused the crime, significant mitigation is established. But here, the evidence runs counter to that very proposition. The murder was not consistent with the proffered symptoms of personality disorder or family background because it was not an impulsive act, nor was it based on lapse of judgment.

See also State v. Pandeli, 215 Ariz. 514, 532, ¶ 72, 161 P.3d 557, 575 (2007) ("Although '[w]e do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence . . . the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence.'"); *see also State v. Sansing*, 206 Ariz. 232, 239, ¶¶ 26–28, 77 P.3d 30, 37 (2003) (absent expert testimony linking cocaine use to defendant's capacity to control his conduct or his capacity to appreciate the wrongfulness of his actions at the time of the murder, defendant did not establish

statutory mitigating circumstance or weighty non-statutory mitigation); *State v. Harrod*, 200 Ariz. 309, 320, ¶ 54, 26 P.3d 492, 502 (2001) ("The [sentencing] court found that the absence of Harrod's biological father was not a mitigating factor because there was no evidence that his absence had any causal relationship to Harrod's participation in the murder. We agree.").

The Ninth Circuit's reading of *Tennard* and *Smith* is not only incorrect, but it is directly contrary to United States Supreme Court precedent. "The Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer." *Harris*, 513 U.S. at 512. "As long as evidence of mitigation [i]s not excluded from consideration at the sentencing proceeding," the principles of *Lockett,* 438 U.S. at 586 and *Eddings*, 455 U.S. at 104 are not violated. *Barclay v. Florida*, 463 U.S. 939, 961, n.2 (1983) (Stevens, J., concurring).

Thus, in direct contradiction to Supreme Court precedent, the Ninth Circuit wrongly set forth a rule that would require a capital sentencer to give specific mitigating weight to mitigation evidence proffered by a capital defendant, regardless of its quality or relationship to the murder. The Ninth Circuit's new rule has no basis in *Tennard* or *Smith*, and is contrary to *Harris*.

The Ninth Circuit's *Smith* analysis directly conflicts with that of the Arizona Supreme Court. Left unchanged, that analysis will affect every Arizona case in which courts or jurors have considered, but given

diminished weight to, proffered mitigation for which a causal nexus has not been established. Moreover, left unchanged, the Ninth Circuit's interpretation will become the benchmark by which federal courts must determine whether a state court decision involved an unreasonable application or *Smith* or *Tennard*. *See* 18 U.S.C. § 2254(d)(1). Given the broad applicability of the Ninth Circuit's decision and its clear conflict with Arizona law as set forth by the Arizona Supreme Court, review by this court is imperative.

Finally, if this Court believes that the Arizona Supreme Court did not even "consider" the evidence of Styers' post-traumatic stress disorder, the State requests that this Court ask for clarification from the Arizona Supreme Court. This Court could do so by certifying the following question to the Arizona Supreme Court:

> Does the causal nexus analysis utilized by the Arizona Supreme Court in addressing mitigation evidence preclude consideration of evidence for which there is no causal nexus, or does the analysis simply provide a mechanism for assessing how much weight, if any, should be accorded the proffered evidence?

CONCLUSION

For these reasons, the Petitioners respectfully request that this Court grant their petition for writ of certiorari.

Respectfully submitted

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

James Lynn Styers, *Petitioner-Appellant,* v. Dora B. Schriro, Arizona Department of Corrections, *Respondent-Appellee.*	No. 07-99003 D.C. No. CV-98-02244-PHX EHC OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
August 20, 2008—Pasadena, California

Filed October 23, 2008

Before: Alex Kozinski, Chief Judge, Jerome Farris and Carlos T. Bea, Circuit Judges.

Per Curiam Opinion

COUNSEL

Cary Sandman of Waterfall Economidis, Caldwell, Hanshaw & Villamana, Tucson, Arizona, and Amy Beth Krauss, Tucson, Arizona, for the petitioner-appellant.

Terry Goddard, Attorney General, and Jeffrey A. Zick, Kent Cattani and J.D. Nielsen, Assistant Attorney General of the State of Arizona, Phoenix, Arizona, for the respondent-appellee.

OPINION

PER CURIAM:

James Lynn Styers, an Arizona state prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition, challenging his conviction and death sentence for conspiracy, first degree murder, and kidnaping. We affirm the district court on all counts, except Styers' claim that the Arizona Supreme Court failed to fulfill its obligations under *Clemons v. Mississippi*, 494 U.S. 738 (1990).

FACTUAL AND PROCEDURAL BACKGROUND

In early December 1989, Styers shot and killed the four-year-old son of Debra Milke, the woman with

whom he and his daughter shared an apartment.[1] A jury subsequently convicted him of first degree murder, conspiracy to commit first degree murder, child abuse and kidnaping. With respect to the murder count, the trial court found three statutory aggravating factors and no mitigating factors sufficiently substantial to call for leniency, and imposed the death penalty.

After exhausting his direct appeals[2] and state collateral review, Styers petitioned for a writ of habeas corpus in federal court, raising a number of constitutional claims regarding his trial and sentencing proceedings. The district court denied his petition, but granted a certificate of appealability as to Styers' claim that he received ineffective assistance of counsel. We expanded the certificate of appealability to include also Styers' claims that the Arizona Supreme Court failed adequately to narrow a facially vague aggravating factor applied in his case, and failed to fulfill its constitutional obligation, under *Clemons*, to reweigh all aggravating and mitigating factors after striking one of the aggravating factors.

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[1] For a more detailed discussion of the facts, see the Arizona Supreme Court's opinion in Styers' direct appeal, *State v. Styers*, 177 Ariz. 104, 865 P.2d 765 (1993).

[2] The child abuse conviction and sentence were vacated on direct appeal. *See Styers*, 177 Ariz. at 117, 865 P.2d at 778. The remaining convictions were affirmed. *Ibid.*

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over Styers' habeas petition under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. § 1291.

Styers filed his § 2254 petition after the effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Habeas relief is therefore available only if the state court ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

DISCUSSION

I. Ineffective Assistance of Counsel

Styers contends that he received ineffective assistance of trial counsel based on counsel's failure to move to strike the jury panel on the grounds of prejudicial pre-trial publicity.[3]

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[3] Although the district court certified additional allegations of ineffective assistance of counsel, Styers does not raise these allegations in his opening brief. We deem them waived. *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990); *United States v. King*, 257 F.3d 1013, 1029 n.5 (9th Cir. 2001).

A. Pre-Trial Publicity

The body of Christopher Milke was found by police in the evening of Sunday, December 3, 1989. The following day, the Arizona Republic, a Phoenix area newspaper, reported on its front page that Milke, Styers, and Roger Scott were arrested and charged with first degree murder. The paper further reported that Milke was not present when the boy was killed, but conspired with "the other suspects to have her son killed." The following day, another article appeared on the front page of the paper speculating as to the possible motives for the killing, including life insurance proceeds and possible abuse. However, the article also reported that the medical examiner who performed the autopsy found no indication of either physical or sexual abuse. The article ultimately indicated that the chief motive appeared to be that Milke and Styers felt the boy was too much trouble, but noted that Styers' three-year-old daughter, who also lived at the apartment, was not harmed. By the third day, the newspaper reported the substance of Scott's statement to police, which included his assertion that he was to receive $250 from Styers for his help and that he drove Styers and Christopher to the general vicinity of the crime scene, after which Styers walked Christopher to a nearby wash[4] and shot him three times. Subsequent articles also reported on the funeral proceedings and reactions by community members to the killing. One article printed several written statements of fourth

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[4] A "wash," also called an "arroyo," is a "dry channel lying in a semiarid or desert area and subject to flash flooding during seasonal or irregular rainstorms." 1 New Encyclopedia Britannica 590 (15th ed.1998).

grade school children; while most focused on their sorrow for Christopher, several children also stated that death was the appropriate punishment for the killers. A total of twenty-five articles about the crime were published in the month of December.

However, in the next seven months (January 1st 1990 through September 10, 1990), only five more articles regarding the crime were published.

Debra Milke was the first of the three defendants to proceed to trial; her trial began on September 11, 1990. Over the next month, twenty-six articles on Milke's trial were published. While the majority of these articles focus on the contents of Milke's confession, a few contain references to Styers as the alleged triggerman and someone who plotted the murder with Milke. The jury returned a guilty verdict in Milke's case on Friday, October 12, 1990.

Jury selection for Styers' trial began three days later on October 15, 1990.

B. Voir Dire Proceedings

The voir dire was conducted entirely by the trial judge. The first group of prospective jurors called for questioning consisted of a venire of thirty-six. After notifying the panel of the charges against Styers, the trial judge asked if anyone had "seen, heard, or read anything about the case." The trial judge observed that "[v]irtually everybody" raised his or her hand. The trial judge then asked whether any of the prospective jurors had formed any opinion as to the

"guilt or innocence" of the defendant. Those who raised their hands in response to this question were then questioned individually, and asked whether they would be able to set aside their opinion. Any juror who indicated in the negative was struck by the trial judge. As jurors were excused, new prospective jurors were rotated into the mix from a separate pool consisting of forty-four. Of these, thirty-nine stated that they had heard of the case, and eighteen admitted to having formed opinions they could not set aside. All eighteen were excused.

Of the final twelve jurors who rendered the verdict, six came from the group of thirty-six who had "virtually" all heard of the case, while the other six came from the group of forty-four. Of these latter six, only one had not heard of the case. However, none of the twelve jurors stated that he or she had formed an opinion about this case – either qualified or unqualified.

C. Ineffective Assistance of Counsel

[1] To establish ineffective assistance of counsel, Styers must show that defense counsel's performance was objectively deficient and resulted in prejudice. *See Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)). Thus, Styers must not only demonstrate that defense counsel's failure to move to strike the jury panel was out of "the wide range of professionally competent assistance," *see Strickland*, 466 U.S. at 690, but also that, had counsel so moved, there is reasonable probability that the motion would

have been granted.[5] *Id.* at 695; *Kimmelman v. Morrison*, 477 U.S. 365, 383-91 (1986). As such, "[t]he governing legal standard plays a critical role in defining the question to be asked in assessing prejudice for counsel's errors." *Strickland*, 466 U.S. at 695.

[2] In reviewing challenges to jury panels based on pre-trial publicity, the Arizona courts apply the same criteria as that employed by the United States Supreme Court. Thus, a defendant challenging a jury panel exposed to pre-trial publicity must show that the publicity likely resulted in the denial of a trial by fair and impartial jurors. *See State v. Greenawalt*, 128 Ariz. 150, 163, 624 P.2d 828, 841 (1981) ("our inquiry is whether the publicity, extensive or otherwise, was prejudicial to the point of having the probable effect of precluding a trial by fair and impartial jurors"); *Dobbert v. Florida*, 432 U.S. 282, 302-03 (1977) (examining the impact of press coverage on juror's impartiality); *Murphy v. Florida*, 421 U.S. 794, 799-801 (1975) (same).

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[5] Generally, a defendant claiming ineffective assistance of counsel for failure to file a particular motion must not only demonstrate a likelihood of prevailing on the motion, but also a reasonable probability that the granting of the motion would have resulted in a more favorable outcome in the entire case. *See, e.g., Kimmelman*, 477 U.S. at 390-91 (explaining that to establish prejudice, a defendant must show not only that counsel would have prevailed on a suppression motion, but also a reasonable probability that exclusion of the evidence would have resulted in acquittal). However, because the motion in this case directly implicates the impartiality of the jury itself (as explained *infra*) no such additional or separate showing of prejudice would appear necessary. *See Dyer v. Calderon*, 151 F.3d 970, 973, n.2 (9th Cir. 1998) (conviction obtained via jury containing even one biased member requires automatic reversal); *see also Sullivan v. Louisiana*, 508 U.S. 275, 281-282 (1993) (deprivation of right to jury constitutes structural error).

In establishing his claim, a defendant may not merely rely on the fact that the prospective jurors were exposed to pre-trial publicity, but must also establish that "the jurors [had] formed preconceived notions concerning the defendant's guilt *and* that they [could] not lay those notions aside." *State v. Walton*, 159 Ariz. 571, 580, 769 P.2d 1017, 1026 (1989) (italics added) (citation omitted); *State v. Jones*, 197 Ariz. 290, 307, 4 P.3d 345, 362 (2000) ("[W]e are concerned with the prejudicial *effect* of pretrial publicity, rather than merely the *amount* of publicity.") (italics in original).

[3] Finally, the Arizona courts fully recognize that, if "a defendant can show pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice or a mere formality, prejudice will be presumed without examining the publicity's actual influence on the jury." *State v. Bible*, 175 Ariz. 549, 563, 858 P.2d 1152, 1166 (1993) (citing *Rideau v. Louisiana*, 373 U.S. 723 (1963)); *see also Greenawalt*, 128 Ariz. 162-63, 624 P.2d 840-841 (citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966)); *Nebraska v. Press Ass'n v. Stewart*, 427 U.S. 539, 554 (1976) (commenting that courts rarely presume prejudice due to outrageous pre-trial publicity).

D. Analysis

Styers acknowledges that he is not basing his ineffective assistance of counsel claim on a theory of actual prejudice – presumably because the voir dire transcript reveals no prejudice on the part of the seated jurors and he submitted no affidavits to the

contrary to the post-conviction court. Instead, Styers argues that the pre-trial publicity was so pervasive and inflammatory that it created a presumption of prejudice and thus trial counsel would have prevailed on a motion to strike the entire venire. The argument fails on this record.

[4] In *Murphy v. Florida*, 421 U.S. 794, 798-800 (1975), the Supreme Court summarized the rare cases in which it had previously found presumptive prejudice based on pre-trial publicity. After so doing, the Court explained that these cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions *or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.*" *Id.* at 799 (italics added). Since *Murphy*, the Supreme Court has twice rejected presumptive prejudice claims based on pre-trial publicity in cases involving far more inflammatory publicity than that in Styers' case.

For example, in *Patton v. Yount*, 467 U.S. 1025 (1984), the media revealed the defendant's "prior conviction for murder, his confession, and his prior plea of temporary insanity." *Id.* at 1029. Despite the fact that 77% of the venire questioned admitted they would "carry an opinion into the jury box," and 8 out of 14 jurors and alternates seated admitted that they at some time had formed an opinion as to defendant's guilt, *id.* at 1029-30, the Court concluded that "the voir dire testimony and the record of publicity do not reveal the kind of 'wave of public passion' that would have made a fair trial unlikely by the jury that was empaneled as a whole." *Id.* at 1040. It set aside the

Third Circuit's finding of "presumed prejudice." *Id.* at 1031-32, 1040.

In *Mu'Min v. Virginia*, 500 U.S. 415 (1991), the Court reviewed a claim in which the petitioner contended that his right to an impartial jury was violated because the trial judge refused to question prospective jurors about the specific contents of the news reports to which they had been exposed. *Id.* at 417, 431. The defendant had submitted 47 articles to the trial court relating to the murder. *Id.* at 418. One or more of these articles discussed details of the murder and investigation, included information about defendant's prior criminal record, information regarding his prior murder conviction, and an indication that he had confessed to the instant killing. *Ibid.* Of the twelve jurors who rendered the final verdict, eight had heard of the case. *Id.* at 421. However, none of them stated he had formed an opinion and all swore that they could enter the jury box with an open mind. *Ibid.* In rejecting petitioner's claim that further inquiry of the jurors was constitutionally required, the Court noted that this was not the type of case where a "presumption of prejudice" was created by the pre-trial publicity and recognized that its holding may have been different had that been the case. *Id.* at 429-30.

[5] In light of *Patton* and *Mu'Min*, Styers cannot demonstrate that his trial attorney would have likely prevailed on a request to strike the jury panel. Unlike in *Mu'Min* and *Patton*, there were no prior articles indicating that defendant had confessed to the crime, nor was there any mention of prior criminal history on

his part. *Mu'Min*, 500 U.S. at 418; *Patton*, 467 U.S. at 1029. And while Styers points to statements made by his accomplice Scott which were reported in the newspaper but not admitted at his trial, these statements were substantially similar to evidence which was ultimately admitted and far less damaging than the inadmissible evidence published in *Patton*. *See Patton*, 467 U.S. at 1029 (trial upheld as fundamentally fair, despite the fact that "publicity revealed [defendant's] prior conviction for murder, his confession, and his prior plea of temporary insanity – information *not admitted into evidence at trial*.") (italics added). Finally, the articles published during Milke's trial – and thus closer in time to Styers' trial – were virtually all factual accounts of her trial proceedings, rather than opinion pieces containing inflammatory rhetoric. *See Murphy*, 421 U.S. at 801 n.4 (noting important distinction between "largely factual publicity" and "that which is invidious or inflammatory").

Appearing to recognize that the Supreme Court opinions are not in his favor,[6] Styers relies almost

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[6] As explained earlier, in reviewing jury challenges due to pre-trial publicity, the Arizona state courts typically apply the Supreme court precedent in this area. Thus, Styers would fare no better under state law. *See, e.g., State v. Bible*, 175 Ariz. 549, 563-66, 858 P.2d 1152, 1166-69 (1993) (citing Supreme Court precedent prior to rejecting presumptive prejudice claim involving 130 news articles, some of which incorrectly labeled defendant as a child molester and mentioned that he failed a lie detector test); *State v. Jones*, 197 Ariz. 290, 307, 4 P.3d 345, 362 (2000) (citing Supreme Court precedent for proposition that courts rarely presume prejudice based on pre-trial publicity and ultimately rejecting claim in trial preceded by 850 articles in print or television and removal of 30 potential jurors for fixed opinion). (Continued)

exclusively on our decision in *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005), in which we held that the denial of a change of venue motion violated due process. However, *Daniels* was issued almost fifteen years after Styers' voir dire proceedings and decided under pre-AEDPA standards. *Daniels*, 428 F.3d at 1196, 1211-1212. As such, Styers cannot rest his ineffective assistance of counsel claim on *Daniels*.[7] *See Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (holding that an attorney is not ineffective for failing to anticipate a decision in a later case); *State v. Gates*, 118 Ariz. 357, 359, 576 P.2d 1357, 1359 (1978) (state courts are not bound by lower federal court precedent).

Finally, Styers argues that the state court's finding of a fair and impartial jury should not be accorded a presumption of correctness under 28 U.S.C. § 2254(e)(1) because the voir dire proceedings were far too brief and cursory to support such a finding. However, even if Styers is correct on this point,[8] his

(Continued).

[7] Daniels is distinguishable in any event, as the publicity therein was far more inflammatory. Daniels was convicted for shooting and killing two officers who had previously shot him while he was fleeing from a bank robbery, rendering Daniels a paraplegic. *Daniels*, 428 F.3d at 1186. Prior to Daniels' trial, a nine foot statue commemorating fallen police officers was erected and publicly unveiled across from the courthouse where his trial took place, numerous published letters called for his execution, and facts regarding his past criminal history – including an arrest for shooting at a police officer – were published by the press. *Id.* at 1211-12.

[8] In *Patton*, the Supreme Court held that the question of whether an individual juror could be fair and impartial was "plainly one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestations of (Continued)

subsequent failure to carry his burden of persuasion in the post-conviction court – through either a showing of actual or presumed prejudice – precludes relief. *See Bible*, 175 Ariz. at 564, 858 P.2d at 1167 ("The burden to show that pretrial publicity is presumptively prejudicial clearly rests with the defendant and is 'extremely heavy.'") (citation omitted); *cf. Daniels*, 428 F.3d at 1211 (defendant conceded that "record contains no findings that any jurors demonstrated partiality or prejudice that could not be laid aside").

[6] The post-conviction state court's determination that Styers "failed to establish . . . . both prongs of ineffective assistance of counsel" cannot be deemed unreasonable under the AEDPA. *See Edwards v. Lamarque*, 475 F.3d at 1125-26.

II. Application of A.R.S. § 13-703(F)(6)

[7] Styers argues that in applying Arizona's "especially heinous or depraved" aggravating factor, under subsection (F)(6), the state courts failed to apply a constitutionally sufficient narrowing construction. However, the United States Supreme Court has squarely rejected this claim. *See Lewis v. Jeffers*, 497 U.S. 764, 777 (1990) (stating that *Walton v. Arizona*, 497 U.S. 639 (1990), "disposes of respondent's claim that Arizona has not construed its subsection (F)(6)

(Continued).

impartiality have been believed," 467 U.S. at 1036, 1038, noting that "the determination is essentially one of credibility, and therefore largely one of demeanor." However, the Court left open the question of whether a presumption of correctness should be applied to a trial court's finding that a "jury as a whole is impartial." *Id.* at 1032, n.7.

aggravating circumstance in a constitutionally narrow manner). Thus, so long as the Arizona State Supreme Court applied its narrowing construction to the facts of Styers' case, all that remains for our review is whether the "state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Jeffers*, 497 U.S. at 780. In this regard, "[a] state court's finding of an aggravating circumstance in a particular case – including a de novo finding by an appellate court that a particular offense is 'especially heinous . . . or depraved' – is arbitrary or capricious if and only if no reasonable sentencer could have so concluded." *Id.* at 783. This requires the application of the *Jackson v. Virginia*, 443 U.S. 307 (1979), standard. *Id.*

Here, when the Arizona Supreme Court rejected Styers' (F)(6) challenge, it applied the narrowing construction contained within *State v. Gretzler*, wherein it had identified five circumstances that support a finding of heinousness and depravity.[9] 135 Ariz. 42, 52, 659 P.2d 1, 11 (1983). The court then found that the senselessness of the murder and the helplessness of the four-year old victim, as well as Styers' special relationship to the child as his full-time caregiver, supported the finding that this murder was especially heinous and depraved. *See Styers*, 177 Ariz. at 115; 865 P.2d at 776.

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[9] In both *Walton* and *Jeffers*, the Arizona Supreme court had cited *Gretzler* in construing and applying the "especially heinous and depraved" factor. *Jeffers*, 497 U.S. at 770-71 (citing *State v. Jeffers*, 135 Ariz. 404, 430, 661 P.2d 1105, 1131 (1983)); *Walton*, 497 U.S. at 645 (citing *State v. Walton*, 159 Ariz. 571, 587, 769 P.2d 1017, 1033 (1989).

[8] The record reveals sufficient evidence to support the application of the (F)(6) finding. *See Gretzler*, 135 Ariz. at 52, 659 P.2d at 11 (noting that "either or both" the senselessness and helplessness factors may, "together with other circumstances present in a particular case," lead to the conclusion that the offense was heinous or depraved); *see also Correll*, 137 F.3d at 1420 (rejecting challenge to application of F(6) factor where trial record revealed, *inter alia*, helplessness of victims and senselessness of murders). The Arizona Supreme Court's finding that Styers committed the murder in an "especially heinous . . . or depraved manner," was neither arbitrary nor capricious. *Jeffers*, 497 U.S. at 784; *cf. Smith v. Mitchell*, 453 F.3d 1203, 1206 (9th Cir. 2006) ("AEDPA requires the federal courts to review *Jackson* claims with additional deference.").

III. *Clemons* duty to re-weigh

[9] On direct review, the Arizona Supreme Court found the aggravating factor of pecuniary gain to be invalid. Styers contends that the court then failed to properly re-weigh the aggravating and mitigating circumstances as required by *Clemons v. Mississippi*, 494 U.S. 738, 748-749 (1990). Under *Clemons*, an appellate court in a "weighing state," such as Arizona, can affirm a death sentence based on an invalid aggravating factor only after conducting either a harmless error review or reweighing the mitigating evidence against the remaining valid aggravating factors. *See Jeffers v. Lewis*, 38 F.3d 411, 414-415 (9th Cir. 1994) (en banc), citing *Clemons*, 494 U.S. at 741.

In so doing, it must consider all relevant mitigating evidence proffered by the defendant. *See Jeffers v. Lewis*, 38 F.3d at 414; *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

A. Exhaustion/Procedural default

[10] The district court dismissed the *Clemons* claim on procedural default grounds, finding first that Styers failed to exhaust it in the Arizona state courts and, second, that he would now be barred from doing so under Arizona Rule of Criminal Procedure 32.2(a)(3). However, after the Arizona Supreme Court had decided his appeal, Styers filed a motion for reconsideration pursuant to Rule 31.18 of the Arizona Rules of Criminal Procedure. *See Correll v. Stewart*, 137 F.3d 1404, 1418 (9th Cir. 1998) (noting that a motion for reconsideration is "an avenue of relief that the Arizona Rules of Criminal Procedure clearly outline"). In his motion, Styers specifically argued that the court had failed to consider relevant mitigating evidence during its independent review of the sentence, in violation of *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982), and the Eighth Amendment. Styers' *Clemons* claim is based on a violation of *Eddings*; he alleges that the Arizona Supreme Court did not satisfy its constitutional duty to reweigh the aggravating and mitigating factors because the court improperly refused to consider relevant mitigating evidence. His motion for reconsideration adequately informed the state court of the factual and legal basis for this claim. It is therefore exhausted. *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

Although the district court did not resolve this claim on the merits, we nevertheless do so here, as is our prerogative. *See Granberry v. Greer*, 481 U.S. 129, 134 (1987) (Appellate courts have discretion to "determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional . . . district court proceedings before reviewing the merits . . . .").

B. Merits

In conducting its independent review of the propriety of Styers' death sentence, the Arizona Supreme Court stated that it had "considered all of the proffered mitigation," *see Styers*, 177 Ariz. at 117, 865 P.2d at 778. However, its analysis prior to this statement indicates otherwise.

With regards to the evidence that Styers suffered from post-traumatic stress disorder as a result of his combat service in Vietnam, the court stated the following:

> This could also, in an appropriate case, constitute mitigation. *See State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989) . . . *However*, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.
>
> Styers, 177 Ariz. at 116, 865 P.2d at 777. (italics added.)

The court's use of the conjunctive adverb "however," following its acknowledgement that such evidence "could" in certain cases constitute mitigation, indicates that this was not such a case.[10] In *Bilke*, the case cited by the *Styers* court as an example of when post-traumatic stress disorder evidence could constitute mitigation, the defendant presented newly-discovered evidence including a psychological report which specifically tied his disorder to his criminal acts. *See Bilke*, 162 Ariz. at 52, 781 P.2d at 29. The *Bilke* court remanded the matter for an evidentiary hearing, stating, "[h]ad the sentencing judge been aware that a mental disease known as post-traumatic disorder existed . . . and that the disorder was a *causative* factor leading to the commission of the crimes, he might well have sentenced the defendant differently." *Bilke*, 162 Ariz. at 53, 781 P2d at 30 (italics added); *cf. State v. Hoskins*, 199 Ariz. 127, 152, 14 P.3d 997, 1022 (2000) (en banc) ("If the defendant fails to prove causation, *the circumstance will not be considered mitigating.*") (italics added); *State v. Vickers*, 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981) (noting that evidence presented by defendant established only that character disorder existed, not that the disorder "impaired his capacity on the night [the victim] was murdered *so as to constitute a mitigating circumstance.*") (italics added.)

[11] In applying this type of nexus test to conclude that Styers' post traumatic stress disorder did not qualify as mitigating evidence, the Arizona

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[10] Dictionary definitions of "however" include "nevertheless; yet; in spite of that; all the same." Webster's New World College Dictionary (4th ed. 2006).

Supreme court appears to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body. *Smith v. Texas*, 543 U.S. 37, 45 (2004) (citing *Eddings*, and stating that nexus test is a test "we never countenanced and now have unequivocally rejected," and that this holding was "plain under [its] precedents"); *see Eddings*, 455 U.S. at 114-15 ("[t]he sentencer, and the [appellate court] on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.") As such, the court could not have fully discharged its obligations under *Clemons*. *Cf. Jeffers*, 38 F.3d at 418 (rejecting *Clemons* claim where it was "clear" that all proffered evidence in mitigation had been considered). We reverse the district court's decision denying relief with regards to this claim. In so doing, however, we neither express nor imply any opinion as to the appropriate sentence in this case. This is a matter for the state courts, so long as the constitutional obligations under *Eddings* and *Clemons* are honored.

DISPOSITION

[12] We vacate the district court's judgment denying the writ of habeas corpus and remand with instructions to grant the writ with respect to Styers' sentence unless the state, within a reasonable period of time, either corrects the constitutional error in petitioner's death sentence or vacates the sentence and imposes a lesser sentence consistent with law.

AFFIRMED in part; VACATED in part and REMANDED.

No. 07-99003

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES LYNN STYERS, Petitioner-Appellant, -vs- DORA B. SCHRIRO, et.al., Respondents-Appellees.	) ON APPEAL FROM) THE UNITED STATES) DISTRICT COURT FOR) THE DISTRICT OF) ARIZONA,) No. CIV-98-2244

RESPONDENTS-APPELLEES' MOTION FOR REHEARING AND REHEARING EN BANC

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EN BANC RULE 35 STATEMENT

The panel found that the Arizona Supreme Court, in its independent review of Styers' death sentence, failed to consider evidence that Styers suffered from post-traumatic stress disorder (PTSD) as a result of his combat service in Vietnam. Notwithstanding the Arizona Supreme Court's express statement, "We have considered all of the proffered mitigation," the panel found that the state court's finding that Styers' PTSD condition did not constitute mitigation because the condition was not connected to the crime, demonstrated that the state court did not adequately consider the proffered mitigation evidence.

Under the standard of review mandated by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state court decision cannot be reversed on federal collateral review unless it involved an unreasonable application of clearly established Supreme Court authority. 28 U.S.C. § 2254 (d)(1). There is no clearly established Supreme Court authority that precludes a state court from finding, after *considering* proffered mitigation evidence, that the proffered evidence is not mitigating. In fact, by noting that the state court only "appears to have" imposed a test contrary to Supreme Court authority (*Styers v. Schriro*, 2008 WL 4661819, at *7), the panel has implicitly acknowledged that there is no clear Supreme Court authority to the contrary. Accordingly, the panel decision should be reversed.

The panel decision is improper under the AEDPA and fails to give deference to the Arizona Supreme Court's findings or to overcome the presumption that the state court knows and follows controlling case law

from the United States Supreme Court. Moreover, the panel decision conflicts with the following United States Supreme Court and Ninth Circuit precedent:

1. *Harris v. Alabama*, 513 U.S. 504, 512 (1995), which holds that mitigation evidence is not entitled to any particular mitigating weight.

2. *Clark v. Ricketts*, 958 F.2d 851, 859 (9th Cir. 1992), which holds that a court is usually deemed to have considered all mitigating evidence where the court so states.

Accordingly, reconsideration by the en banc court is necessary to secure and maintain uniformity of the court's decisions

STATEMENT OF THE CASE

James Lynn Styers was convicted of first-degree murder, conspiracy to commit first-degree murder, child abuse, and kidnapping. *State v. Styers*, 177 Ariz. 104, 108, 865 P.2d 765, 769 (1993). The trial court found three aggravating factors: the victim was under the age of 15, A.R.S. § 13–703(F)(9); the murder was committed in expectation of pecuniary gain, A.R.S. § 13–703(F)(5); and the murder was committed in an especially heinous and depraved manner, A.R.S. § 13–703(F)(6). After considering all proffered mitigating evidence, the trial court found the mitigation was not sufficiently substantial to call for leniency. *Styers*, 177 Ariz. at 109, 865 P.2d at 770.

On direct appeal, the Arizona Supreme Court reversed the finding of the pecuniary gain aggravating factor. The state court found that there was insufficient evidence that Styers' co-defendant, Debra Milke, agreed to pay Styers to murder her 4-year-old son. 177 Ariz. at 115, 865 P.2d at 776. The court nevertheless upheld Styers' death sentence after independently reviewing the remaining aggravating circumstances and the mitigating evidence proffered by Styers:

> The special verdict stated that none of the statutory mitigating circumstances were proven and found no nonstatutory "mitigating circumstances sufficiently substantial to call for leniency." Defendant argues that the following facts constitute mitigating evidence that warrants leniency: no prior criminal record; honorable discharge from United States Marines after serving in Vietnam; evidence that defendant suffered from post-traumatic stress syndrome; defendant cared for Christopher; and the giving of a felony murder instruction.
>
> Defendant had no prior convictions for either misdemeanors or felony offense. This is relevant mitigating evidence. *See State v. Rossi (Rossi III),* 171 Ariz. 276, 279, 830 P.2d 797, 800, *cert. denied,* 506 U.S. 1003, 113 S.Ct. 610, 121 L.Ed.2d 544 (1992). Defendant's service in Vietnam and honorable discharge are also relevant

mitigating circumstances. *See State v. Lavers,* 168 Ariz. 376, 396, 814 P.2d 333, 353, *cert. denied,* 502 U.S. 926, 112 S.Ct. 343, 116 L.Ed.2d 282 (1991). Defendant also suffered from post-traumatic stress disorder prior to and around the time of the murder as a result of his combat service in Vietnam. This could also, in an appropriate case, constitute mitigation. *See State v. Bilke,* 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989) (finding evidence of post-traumatic stress disorder constituted newly discovered evidence that may have affected sentencing). However, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.

There was testimony that defendant cared for Christopher at times, but his actions and participation in his murder speak volumes to that. Finally, giving a felony murder instruction "is not relevant 'where the defendant intended to kill the victim or where the defendant knew with substantial certainty that his conduct would cause death.'" *State v. Gillies,* 135 Ariz. 500, 513, 662 P.2d 1007, 1020 (1983) (quoting *State v. Zaragosa,* 135 Ariz. 63, 659 P.2d 22, *cert. denied,* 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1356 (1983)). The defendant conspired to kill Christopher and then he killed him. The

> fact that the court gave a felony murder instruction is not mitigating here.
>
> Because the trial court did not list each of the proffered items of claimed mitigation and state that it found them unavailing does not mean that the trial court did not consider them. It is apparent that the trial court considered this evidence, but ultimately found that it was not sufficiently substantial to call for leniency. We will also consider it in our independent review.
>
> . . .
>
> This court independently reviews aggravating and mitigating circumstances to determine whether the death penalty was properly imposed. *See Rossi*, 171 Ariz. at 278, 830 P.2d at 799. We have excluded from our consideration pecuniary gain, having found the evidence does not prove that factor beyond a reasonable doubt. We have *considered* all of the proffered mitigation and, like the trial court, find it is not sufficiently substantial to warrant leniency.

177 Ariz. at 116–17, 865 P.2d at 777–78. (Emphasis added.)

After exhausting his state post-conviction review, Styers petitioned for a writ of habeas corpus in district court, raising a number of constitutional claims regarding his trial and sentencing proceedings. The

district court denied his petition, but granted a certificate of appealability as to his claim that he received ineffective assistance of counsel. This Court expanded the certificate of appealability to include a claim that the Arizona Supreme Court failed to narrow a facially vague aggravating factor, and failed to properly reweigh all aggravating and mitigating factors after striking one of the aggravating factors.

On appeal to this Court, the panel held that the Arizona Supreme Court required a causal nexus between the mitigating evidence and the crime before giving the mitigation adequate consideration. Despite the Arizona Supreme Court's explicit statement that it had considered all of the proffered mitigation, the panel erroneously concluded that the state court failed to consider Styers' mitigation evidence of post-traumatic stress disorder in violation of *Smith v. Texas*, 543 U.S. 37 (2004), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) .

ARGUMENTS

I

THE PANEL'S DECISION FAILS TO GIVE PROPER DEFERENCE TO THE ARIZONA SUPREME COURT'S FINDING THAT IT CONSIDERED ALL OF THE PROFFERED MITIGATION.

Despite the Arizona Supreme Court's statement to the contrary, the panel found that the state court

failed to give effect to the mitigation evidence that Styers presented. This Court should reconsider this finding because there is no United States Supreme Court authority that precludes a state court from making a finding, after having considering proffered mitigating evidence, that the evidence is not mitigating. Furthermore, the panel's decision is contrary to this Circuit's case law.

In *Clark v. Ricketts*, 958 F.2d 851, 858–59 (9th Cir. 1992), an Arizona defendant argued that because the trial court did not list all of the proffered mitigation when it imposed sentence, the state court violated its duty to consider all proffered mitigation under *Eddings*. This Court found that the trial court's statement that it had considered all of the proffered mitigation satisfied *Eddings*. *Id.* at 859. "The due process clause does not require that the sentencing court exhaustively document its analysis of each mitigating factor as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant." *Id.* at 858. (citing *Parker v. Dugger*, 498 U.S. 308, 314–15 (1991) (statement by the sentencing court that it considered all mitigating evidence adequate)).

More recently, this Court embraced the tenet, that a court is presumed to have considered all mitigating evidence where the court so states, in *Lopez v. Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007). In that case, Lopez argued that the trial court made contradictory statements at the aggravation/mitigation hearing which suggested that she was excluding from

consideration a "whole category of mitigation evidence." 491 F.3d at 1037. This Court found that, although the sentencing court's statements were susceptible to differing interpretations, Lopez's interpretation, read in isolation, was not enough to overcome the presumption that the state court knew and followed the law. *Id.* Moreover, this Court further found:

> Under AEDPA, we must do more than find the statement ambiguous—we would have to conclude that the Arizona Supreme Court was *objectively unreasonable* in concluding the sentencing court did, in fact, review all the proffered mitigating evidence.

Id. at 1037–38. (Emphasis in original.)

In the instant case, the panel decision fails to give any deference to the Arizona Supreme Court's finding that it considered all of the proffered mitigation evidence. The Arizona Supreme Court found, as in *Lopez*, that although the trial court failed to list all of the proffered mitigation in its special verdict, it nonetheless considered all of the proffered mitigation evidence. *Styers*, 177 Ariz. at 117, 865 P.2d at 778. Likewise, the Arizona Supreme Court stated that it considered all of the *proffered* mitigation evidence in its independent review of Styers' death sentence. *Id.* The panel's decision failed to properly presume that the state court followed the law. Moreover, there was nothing presented to the panel for it to overcome the presumption that the Arizona Supreme Court knew

and followed the law. In light of the standard of review mandated by the AEDPA, this Court should reconsider the panel's decision.

II

THE PANEL MISREADS THE ARIZONA SUPREME COURT'S OPINION AND MISINTERPRETS *SMITH v. TEXAS*.

The failure to presume that the Arizona Supreme Court knew and followed the law notwithstanding, the panel's decision is based on a flawed interpretation of *Smith v. Texas*, 543 U.S. 37 (2004), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). According to the panel, those cases hold that a sentencer must give substantial weight to *any* mitigating evidence proffered by a capital defendant:

> In conducting its independent review of the propriety of Styers' death sentence, the Arizona Supreme Court stated that it had "considered all of the proffered mitigation," *see Styers*, 177 Ariz. at 117, 865 P.2d at 778. However, its analysis prior to this statement indicates otherwise.
>
> With regards to the evidence that Styers suffered from post-traumatic stress disorder as a result of his combat service in Vietnam, the court stated the following:

> This could also, in an appropriate case, constitute mitigation. *See State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989) . . . *However*, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.
>
> *Styers*, 177 Ariz. at 116, 865 P.2d at 177. (Italics added.)

The court's use of the conjunctive adverb "however," following its acknowledgment that such evidence "could" in certain cases constitute mitigation, indicates that this was not such a case.

. . .

In applying this type of nexus test to conclude that Styers' post traumatic stress disorder did not qualify as mitigating evidence, the Arizona Supreme Court appears to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body.

Styers v. Schriro, 2008 WL 4661819 *7. (Citing *Smith v. Texas*, 543 U.S. at 45.)

The panel opinion should be reconsidered because it misinterprets both the Arizona Supreme Court's opinion and the relevant case law. The panel has mischaracterized the Arizona Supreme Court's legal conclusion and analysis. The Arizona Supreme Court did not decline to *consider* Styers' proffered mitigation regarding his diagnosis of post-traumatic stress disorder. Instead, the state court determined that the proffered mitigating evidence of post-traumatic stress disorder was not mitigating.

Likewise, the panel's reliance on *Smith* is unavailing. In *Smith*, the Supreme Court found unconstitutional a sentencing scheme that negated jurors' ability to consider and give effect to mitigation evidence if the evidence did not directly relate to two statutorily specified issues. 543 U.S. at 47. In that case, before the jury reached its sentence, the trial judge gave a supplemental instruction directing the jury to give effect to mitigation evidence, but allowed the jury to do so only by negating what would otherwise be affirmative responses to the special issues instruction relating to deliberateness and future dangerousness. *Id.* at 38.

The Court, relying on its holding in *Tennard v. Dretke*, 542 U.S. 274 (2004), reiterated that "the jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a 'low threshold of relevance,' which is satisfied by 'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" 542 U.S. at 284–85 (quoting *McKoy v. North Carolina*, 494 U.S.

433, 440 (1990)). The Court found that the supplemental jury instruction given in *Smith* was similar to the one found unconstitutional in *Penry v. Johnson (Penry II)*, 532 U.S. 782 (2001). There the Court held:

> We generally presume that jurors follow their instructions. Here, however, it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because Penry's mitigating evidence did not fit within the scope of the special issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction.
>
> . . .
>
> The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence.

Id. at 799–800.

Thus, *Smith* and *Tennard* stand only for the proposition that a sentencer cannot be precluded from *considering* proffered mitigation evidence. *Smith* and *Tennard* do not support an assertion that the sentencer cannot determine the weight to be afforded proffered mitigation based on its causal nexus to the crime. In its independent review of Styers' death sentence, the Arizona Supreme Court did not unreasonably apply Supreme Court precedent. Unlike in *Smith*, there

were no jury instructions barring the consideration of Styers' proffered mitigation, and in fact the evidence was considered by a sentencer (a state trial judge) who is presumed to know and follow the law. Styers was not barred from presenting mitigation evidence and the state court considered all of his proffered mitigation evidence.

In considering Styers' mitigating evidence of PTSD, the Arizona Supreme Court found that it was not particularly relevant in this case. By stating that Styers' evidence of post-traumatic stress disorder could have been mitigating in another type of case, the Arizona Supreme Court was not saying it did not consider the evidence—the state court was opining that the evidence did not have any particular mitigating weight. This was not a case where Styers' alleged PTSD condition had any connection to the murder of the 4-year-old victim. Styers planned the murder—Styers tricked the victim into believing he was going to see Santa Claus, and took him into the desert and shot the victim in the back of the head. There was no evidence that the murder was the result of any combat flashbacks or combat stress. Styers' condition was not relevant to his murderous act.

Thirty years ago, the United States Supreme Court held that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). The Court later held that a capital sentencer must be allowed to consider all relevant mitigating evidence:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence . . . The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (emphasis in original). *See also McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment) ("*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.").

The Eighth Amendment thus requires only that a sentencer be able to consider and give effect to mitigating evidence proffered by a capital defendant. This Constitutional provision is satisfied unless evidence is "placed beyond the effective reach of the sentencer" and the sentencer is precluded from considering the proffered mitigation in the first instance. *Graham v. Collins*, 506 U.S. 461, 474 (1993); *see also Kansas v. Marsh*, 548 U.S. 163, 175 (2006) ("In aggregate, [this Court's] precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and

oblige sentencers to *consider* that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here."). (Emphasis added.)

In the instant case, the Arizona Supreme Court explicitly stated that, like the trial court, it considered all of the proffered mitigation evidence. *Styers*, 177 Ariz. at 117, 865 P.2d at 778. There is nothing in the state court's opinion indicating that it failed to consider mitigating evidence or that it barred any mitigating evidence from consideration. While the Arizona Supreme Court imposed a causal nexus test in determining the weight to be given Styers' post-traumatic stress disorder, there can be no doubt that the court considered the mitigation in its independent review:

> It is apparent that the trial court considered this evidence, but ultimately found that it was not sufficiently substantial to call for leniency. We will also consider it in our independent review.
>
> . . .
>
> We have considered all of the proffered mitigation, and like the trial court, find it is not sufficiently substantial to warrant leniency.

Id.

The Arizona Supreme Court has made clear, both prior to and after the *Tennard* and *Smith* decisions, that the sentencer in a capital case cannot be

prohibited from *considering* any proffered mitigation, but that the absence of a causal nexus to the crime may be considered in assessing the weight or significance to be afforded the proffered evidence. In *State v. Hoskins*, 199 Ariz. 127, 152, ¶ 113, 14 P.3d 997, 1022 (2000), the court stated:

> The "nexus" or "causal link" requirement in these cases has purpose. Where we determine questions of aggravation and mitigation in the sentencing process, the significant point in time for causation is the moment at which the criminal acts are committed. If the defendant's personality disorder or dysfunctional family background leads reasonable experts to conclude that the disorder in fact caused the crime, significant mitigation is established. But here, the evidence runs counter to that very proposition. The murder was not consistent with the proffered symptoms of personality disorder or family background because it was not an impulsive act, nor was it based on lapse of judgment.

See State v. Pandeli, 215 Ariz. 514, 532, ¶ 72, 161 P.3d 557, 575 (2007) ("Although '[w]e do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence . . . the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence.'"); *see also State v. Sansing*, 206 Ariz. 232, 239, ¶¶ 26–28, 77 P.3d 30, 37

(2003) (absent expert testimony linking cocaine use to defendant's capacity to control his conduct or his capacity to appreciate the wrongfulness of his actions at the time of the murder, defendant did not establish statutory mitigating circumstance or weighty non-statutory mitigation); *State v. Harrod*, 200 Ariz. 309, 320, ¶ 54, 26 P.3d 492, 502 (2001) ("The [sentencing] court found that the absence of Harrod's biological father was not a mitigating factor because there was no evidence that his absence had any causal relationship to Harrod's participation in the murder. We agree.").

The panel's reading of *Tennard* and *Smith* is not only incorrect, but it is directly contrary to United States Supreme Court precedent. "The Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer." *Harris v. Alabama*, 513 U.S. 504, 512 (1995). "As long as evidence of mitigation [i]s not excluded from consideration at the sentencing proceeding," the principles of *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), are not violated. *Barclay v. Florida*, 463 U.S. 939, 961, n.2 (1983) (Stevens, J., concurring).

Thus, in direct contradiction to Supreme Court precedent, the panel wrongly set forth a rule that would require a capital sentencer to give specific mitigating weight to mitigation evidence proffered by a capital defendant, regardless of its quality or relationship to the murder. The panel's new rule has no basis in *Tennard* or *Smith*, and is contrary to *Harris*.

Finally, if this Court believes that the Arizona Supreme Court did not even "consider" the evidence of Styers' post-traumatic stress disorder, Respondents-Appellees request that this Court certify the following question to the Arizona Supreme Court:

Does the causal nexus analysis utilized by the Arizona Supreme Court in addressing mitigation evidence preclude consideration of evidence for which there is no causal nexus, or does the analysis simply provide a mechanism for assessing how much weight, if any, should be accorded the proffered evidence?

CONCLUSION

The panel failed to give proper deference to the Arizona Supreme Court's finding that it had considered all of the proffered mitigation evidence. Additionally, the panel erred by misinterpreting *Smith* and *Eddings* regarding the consideration of proffered mitigation evidence. Respondents-Appellees respectfully request that this Court grant this motion for rehearing and petition for rehearing *en banc*. Alternatively, Respondents-Appellees request that this Court certify the question set forth above to the Arizona Supreme Court

Respectfully submitted,

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Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 3,204 words.

JEFFREY A. ZICK

No. 07-99003

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES LYNN STYERS, Petitioner-Appellant, -vs- DORA B. SCHRIRO, et.al., Respondents-Appellees.	) ON APPEAL FROM) THE UNITED STATES) DISTRICT COURT FOR) THE DISTRICT OF) ARIZONA,) No. CIV-98-2244

Pursuant to Circuit Rule 28–2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any related cases.

DATED this 5th day of November, 2008.

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